FILE COPY

PETITION NOT PRINTED

FILED
NOV 3 1954

In the Supreme Court of the United States

OCTOBER TERM, 1954

KENNETH M. ADAMS, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 568

KENNETH M. ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 333 F.2d 766.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1964. Mr. Justice White extended the

---

[1] The record is in two volumes. Volume II is the record of the proceeding under 28 U.S.C. 2255 in the district court. The government is filing with the Clerk a copy of the information and transcript of the proceedings on the plea of guilty.

time for filing of a petition for a writ of certiorari to and including October 8, 1964, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a conviction under 26 U.S.C. 4705(a), relating to the unlawful transfer of narcotics, should have been set aside on motion under 28 U.S.C. 2255 because the name of the transferree was not alleged in the information.

STATUTE INVOLVED

26 U.S.C. 4705(a) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

STATEMENT

On January 27, 1961, petitioner, who was represented by counsel of his own choice (Tr. 1-2), waived indictment and pleaded guilty in the United States District Court for the Western District of Missouri to a seven-count information charging narcotics violations (Tr. 2-3). Counts I, III, V and VII charged unlawful purchase and possession of certain narcotic drugs in violation of 26 U.S.C. 4704(a). Counts II, IV

and VI charged the sale and exchange of narcotics to one not in possession of an authorized form in violation of 26 U.S.C. 4705(a). Conviction under the 4704(a) counts is admittedly valid (R. II, 10, 23, 28-29). Petitioner was sentenced to consecutive terms of five years on counts I and II (Tr. 7), the five year sentences on the other counts to run concurrently with each other and with the sentences under counts I and II (Tr. 8). The counts of the information laid under 26 U.S.C. 4705(a) did not recite the name of the person to whom the drugs were allegedly sold. At arraignment, the Assistant United States Attorney related to the court the circumstances of the case, including the fact that the purchaser had been a narcotics agent (Tr. 3-5). Petitioner volunteered to tell the court where and how he had obtained the narcotics involved (Tr. 6-7).

Almost two years after sentence, petitioner filed a motion to vacate sentence under 28 U.S.C. 2255, alleging that the information as to the counts under 4705(a) was fatally defective for failure to name the person to whom the drugs were allegedly sold (R. II, 9-12). The motion was overruled by the district court (Pet. App. B-C) and the court of appeals affirmed *per curiam* (Pet. App. A).

ARGUMENT

The precise issue which petitioner seeks to raise was before the Court last Term in *Clay* v. *United States*, 326 F.2d 196 (C.A. 10), certiorari denied, 377 U.S. 1000. There, as here, the petitioner pointed to

a conflict with the decision of the Court of Appeals for the Seventh Circuit in *Lauer* v. *United States*, 320 F.2d 187 (C.A. 7). In our brief in opposition in *Clay* (No. 957 Misc., O.T., 1963) we expressed our view that the *Lauer* decision was wrong and pointed out that no other circuit had agreed with it; we added that we had not thought, at the time of the *Lauer* decision, that the question was of sufficient importance to warrant seeking review by this Court, and that the subsequent rejection of *Lauer* by other circuits had confirmed our view in this respect. Since that time, the Sixth Circuit has joined the list of circuits which reject *Lauer*. *United States* v. *Dickerson*, No. 15691, decided September 29, 1964. There is thus no persuasive reason for this Court to review the issue now.[2]

The decision below (as well as those of other circuits which decline to follow *Lauer*) is clearly correct. The rule is that if "the indictment purports to charge, though defectively, a crime of a class triable in the district courts, it is enough to immunize the judgment from collateral attack." *United States* v. *Roberts*, 296 F.2d 198, 201 (C.A. 4) and cases cited in note 6. Indeed, the information here is sufficient to withstand attack on direct appeal since it sets forth the elements of the offense, apprises the accused of the nature of the charge and protects him from double jeopardy. See *Russell* v. *United States*, 369 U.S. 749,

---

[2] In view of the rejection of the *Lauer* decision by other circuits, the government is seeking to have the Seventh Circuit reconsider that issue in *Collins* v. *Markley*, No. 14641, presently scheduled for argument.

765, and cases cited. The courts of appeals, including the Seventh Circuit in *Lauer*, agree that the "name of the purchaser" is not an element of the offense. *United States* v. *Dickerson*, No. 15691, decided September 29, 1964 (C.A. 6); *Adams* v. *United States*, 333 F.2d 766 (C.A. 8); *Clay* v. *United States*, 326 F.2d 196, 199 (C.A. 10); see, generally, *Nigro* v. *United States*, 276 U.S. 332. Hence, the name of the purchaser goes only to the proof of whether the defendant made a sale. Cf. *United States* v. *Debrow*, 346 U.S. 374.

The information, which gave the time [day], place [city] and subject matter [so many tablets of Morphine Sulphate] of the alleged sale, completely apprised this petitioner of the nature of the charge against him, a fact amply borne out by the record (Tr. 2-8). The allegation of a "sale" implies not only a specific time and place, but the existence of a purchaser—permitting petitioner to file a bill of particulars for details he might consider essential to his defense. At no time has petitioner suggested that he did not know the purchaser's name or that its omission in the information prejudiced him. Petitioner's objections on grounds of double jeopardy are unfounded. The specificity of the record with relation to dates, places and subject matter would protect petitioner if he were retried. In any event, a judgment on an indictment framed in general terms is a bar to subsequent prosecution for any offense which could have been proved under the indictment, thereby giving greater protection to petitioner from the very generality of its terms. *Miller* v. *United States*, 300

Fed. 529 (C.A. 6), certiorari denied, 266 U.S. 624; *United States* v. *Olmstead*, 5 F.2d 712, 714 (W.D. Wash.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

November 1964

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 740815 354